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No. _____

In The

Supreme Court of the United States

THOMAS R. FOLEY, SR.,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is New York Penal Law §235.22 a content-based restriction on speech which cannot survive strict scrutiny analysis?

2. Is New York Penal Law §235.22 unconstitutionally vague?

3. Is new York Penal Law §235.22 unconstitutionally overbroad?

4. Does New York Penal Law §235.22 violate the Commerce Clause?

5. Is New York Penal Law §263.15 unconstitutionally overbroad?

PARTIES TO THE PROCEEDING

Thomas R. Foley, Sr., Petitioner
People of the State of New York, Respondent
Attorney General of the State of New York, Intervenor

PARENT AND SUBSIDIARY COMPANIES

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

PARENT AND SUBSIDIARY COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

POINT I -

PENAL LAW §235.22 IS A CONTENT-BASED RESTRICTION ON SPEECH WHICH CANNOT SURVIVE STRICT SCRUTINY UNDER THE FIRST AMENDMENT 13

POINT II -

PENAL LAW §235.22 IS UNCONSTITUTIONALLY VAGUE AND MUST BE DECLARED VOID 18

A. The "Sexual Conduct For His Benefit" Element of Penal Law §235.22(2) is Also Unconstitutionally Vague 22

POINT III -

PENAL LAW §235.22 IS UNCONSTITUTIONALLY OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 23

POINT IV -

PENAL LAW §235.22 VIOLATES THE COMMERCE CLAUSE 25

POINT V -

PENAL LAW §263.15 IS UNCONSTITUTIONALLY OVERBROAD 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

American Libraries Association v. Pataki,
969 F.Supp. 160 (S.D.N.Y. 1997) 20, 26

Boos v. Barry, 485 U.S. 312,
108 S.Ct. 1157 (1988) 14

Broadrick v. Oklahoma, 413 U.S. 601,
93 S.Ct. 2908 (1973) 24

Coates v. Cincinnati, 402 U.S. 611,
91 S.Ct. 1686 (1971) 19

Connally v. General Constr. Co., 269 U.S. 385,
46 S.Ct. 126 (1926) 19

Finley v. National Endowment for the Arts,
100 F.3d 671 (9th Cir. 1996) 19

Free Speech Coalition v. Reno, 198 F.3d 1083
(9th Cir. 1999) 29, 30

Grayned v. Rockford, 408 U.S. 104,
92 S.Ct. 2294 (1972) 17, 19, 20, 24

Kolender v. Lawson, 461 U.S. 352,
103 S.Ct. 1855 (1983) 19, 20

New York v. Ferber, 458 U.S. 747,
102 S.Ct. 3348 (1982) 13, 28, 29

People v. Barrows, 177 Misc.2d 712,
677 N.Y.S.2d 672 (Kings Co. 1998) 16

People v. Thomas R. Foley, Sr., 257 A.D.2d 243,
692 N.Y.S.2d 248 (4th Dept. 1999) 1

People v. Thomas R. Foley, Sr., 94 N.Y.2d 668,
2000 WL 375547 (Ct. Appeals, 4/11/2000) 1

Pike v. Bruce Church, Inc., 397 U.S. 137,
90 S.Ct. 844 (1970) 26

R.A.V. v. City of St. Paul, 505 U.S. 377,
112 S.Ct. 2538 (1992) 13

Reno v. American Civil Liberties Union,
521 U.S. 844, 117 S.Ct. 2329 (1997) 15, 21, 25

Rosenberger v. Rector and Visitors of the University of
Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995) 13

Sable Communications of California, Inc. v. FCC,
492 U.S. 115, 109 S.Ct. 2829 (1989) 14, 25, 21

Simon & Schuster v. New York Crime Victim's Board,
502 U.S. 105, 112 S.Ct. 501 (1991) 14

Smith v. Goguen, 415 U.S. 566,
94 S.Ct. 1242 (1974) 19

United States v. O'Brien, 391 U.S. 367,
88 S.Ct. 1673 (1968) 16

Statutes:

Child Pornography Protection Act 27, 29, 30

Communications Decency Act 15

New York State Penal Law
Section 235.22 ..... passim

New York State Penal Law
Section 263.10..... 3

New York State Penal Law
Section 263.15.....passim

New York State Penal Law,
Section 10.00(17).....22

New York State Penal Law,
Section 110/235.22.....11

New York State Penal Law,
Section 110/235.22(1) 4

New York State Penal Law,
Section 110/235.22(2) 4, 22, 23

New York State Penal Law,
Section 235.05(1) 3

New York State Penal Law,
Section 235.20(3).....22

New York State Penal Law,
Section 235.22(1) 26

New York State Penal Law,
Section 235.22(2).....18

New York State Penal Law,
Section 235.23..... 3

New York State Penal Law,
Section 235.24..... 3

Title 18 United States Code,
Section 2256(8)(B)..... 29

Title 28 United States Code,
Section 1257 1

Rules:

United States Supreme Court,
Rule 13 1

United States Supreme Court,
Rule 29.6 ii

Constitutional Provisions:

New York State Constitution,
Article I, §8..... 11

United States Constitution,
Article I, Section 8 .....passim

United States Constitution,
First Amendment .....passim

United States Constitution,
Fifth Amendment 1, 23

United States Constitution,
Fourteenth Amendment.....2, 11, 12, 23, 24, 30

OPINIONS AND ORDERS BELOW

People v. Thomas R. Foley, Sr., 94 N.Y.2d 668, 2000 WL 375547 (Ct. Appeals, 4/11/2000)

People v. Thomas R. Foley, Sr., 257 A.D.2d 243, 692 N.Y.S.2d 248 (4th Dept. 1999)

JURISDICTION OF THIS COURT

The order of the New York State Court of Appeals affirming the decision and order of the Appellate Division, Fourth Judicial Department, was filed on April 11, 2000. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257 and Rule 13 of the Rules of this Court as a final judgment entered by a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause)

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

New York State Penal Law §235.22

> A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to

initiate or engage in such communication with a person who is a minor; and

2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

Disseminating indecent material to minors in the first degree is a class D felony.

New York State Penal Law §235.23

[lengthy provisions set out in Appendix at pages 36-37]

New York State Penal Law §235.24

[lengthy provisions set out in Appendix at page 38]

New York State Penal Law §263.15

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

STATEMENT OF THE CASE

Petitioner was charged in an Oneida County indictment filed on May 8, 1997 with three counts of Promoting an Obscene Sexual Performance by a Child in violation of Penal Law §263.10; three counts of Promoting a Sexual Performance by a Child in violation of Penal Law §263.15; three counts of Obscenity in the Third Degree in violation of Penal Law §235.05(1); and two

counts of Attempted Disseminating Indecent Material to Minors in the First Degree in violation of Penal Law §110/235.22(1) and (2).

A jury trial was conducted from November 18-25, 1997. Prior to opening arguments, the People moved to dismiss six counts of Obscenity in the Third Degree and Promoting an Obscene Sexual Performance by a Child.

A chief engineer for a radio station in Lockport, New York, petitioner first used computers as a part of his rehabilitation after suffering serious head injuries in an automobile accident in 1988. During the Spring of 1996, a friend helped him download Internet Relay Chat software which enabled petitioner to communicate with other people on the Internet. Towards the end of the Summer of 1996, petitioner started participating in public chat rooms [1077-82, 1087].[1] These sites allowed users to enter a chat room and view or participate in the computer-mediated discussions other people were having related to the chat room topic. The user's computer screen would show the text of these conversations. If so desired, two or more people could move their discussion to a private chat room where their conversation could not be seen by just anyone who entered the public chat room [497].

New York State Police Trooper Mark Williams was also a computer user -- as part of his job. In March 1993, Williams was assigned to the Computer Crime Unit, which was responsible for investigating the dissemination of child pornography over the Internet [489-90]. At the time of the trial herein, Williams was on a paid suspension as a result of assault and menacing charges filed against him by his wife on May 21, 1996. These charges were adjourned in contemplation of dismissal with the consent of the Oneida County District Attorney -- the same agency which

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[1] Numerical references in brackets are to pages of the Record on Appeal before the New York State Court of Appeals.

prosecuted petitioner below [486-87, 728-30]. The State Police had also conducted a disciplinary hearing regarding Williams' conduct, but no decision had yet been made [487].

Trooper Williams testified concerning five Internet chat discussions he had with petitioner during the months of October and November 1996. While approved by his superiors, Williams' Internet activity was not governed by any written protocol. The investigative procedures were developed on an *ad hoc* basis; the only investigative standard limiting Williams' computer investigation was the verbal understanding that, on the first exchange, the police would not initiate contact and that the police would not send child pornography to anyone [756-59].

During the evening of October 27, 1996 and into the early morning hours of the next day, Trooper Williams was working at the Marcy Barracks in Oneida County. Using his on-line persona, Aimee, Williams entered a chat room entitled "Kids of Family Sex." At approximately 11:37 p.m., Williams claimed that another computer user with the screen name "JustMee" asked him "WEanna (sic) chat sex" [508, 516-18]. A conversation ensued during which Williams portrayed himself as fifteen-year-old Aimee, a sexually active girl who had sex with her father [518-19].

Aimee and JustMee exchanged information. Aimee claimed to be from Utica and, upon learning that JustMee was from Buffalo, said she had an uncle there. JustMee told Aimee that he was fifty-one years old and married with two children [520-23]. The conversation revolved generally around sexual activity. Trooper Williams, as Aimee, described sexual intercourse between Aimee and her fictional father and discussed masturbation with JustMee. JustMee described a fantasy sexual encounter with Aimee and inquired as to whether Aimee might try an older man. Aimee responded, "yes" [519-20, 526, 529-30].

As Williams recalled, at approximately 12:20 a.m., JustMee offered to send Aimee some "preteen fucking pics." Aimee said she

would like to see them, so a number of graphic image files were sent [521]. Trooper Williams, as Aimee, said, "I like these Kid Sex pics. You get tired of seeing only adult stuff" [523].

During this initial conversation between JustMee and Aimee, Williams used certain computer commands to identify JustMee's Internet Service Provider as MicroAge WNY [532-36]. The service provider subsequently identified the account of Thomas R. Foley, Sr., as being connected to one of MicroAge's modems during the October 28, 1996 conversation with Aimee [817-32].

Testifying in his own behalf, petitioner recalled the events of October 27th to 28th very differently. While Williams claimed that petitioner as "JustMee" had initiated the chat discussion, petitioner recalled Williams breaking into a conversation he was having with someone else. Petitioner explained that he entered the "Daddy/Daughter" chat room on the evening of October 27th and observed only two other participants, Aimee and Redstone. He saw no discussion on his screen, so he assumed that Aimee and Redstone were having a private chat [1090-91]. Petitioner then entered a chat room entitled "Kids of Family Sex" and noted a number of other computer users were already there. Seeing someone who identified himself as a father, petitioner attempted to contact him for the purpose of arranging a direct chat [1091-92]. A two-finger typist, petitioner customarily watched his keyboard as he typed. On this occasion, he contacted the other person and typed, "Hi." When this other individual responded in like fashion, petitioner looked down at his keyboard and typed, "wanna chat sex." When he looked up at his screen, however, petitioner saw that Aimee -- rather than the person he had engaged in conversation -- had responded, "yes, w/my father" [1092-93].

Petitioner explained that this substitution of parties will happen when a computer user engages in a direct chat with another user and a third party intervenes seeking a private chat. In such a situation, the message intended for the original person contacted will

instead go to the intervening third party -- in this case, Aimee [1092-93].

Recognizing that Aimee was not the one he had originally contacted, petitioner continued the discussion in light of the responses he received from this persona even though Aimee purported to be a fifteen-year-old girl. Reflecting Trooper Williams' own experience with the Internet, petitioner understood that role playing was common in these chat rooms and that if another person was presenting as a female, usually it was actually a male [760, 1094]. Significantly, petitioner did not believe that Aimee was actually a teenager who had sex with her father [1095]. He in fact thought that Aimee was a fantasy persona of a male chat room participant -- that the other person was role playing as Aimee [1096-97].

Petitioner admitted having a sexually explicit conversation with the individual playing the role of Aimee and also sending graphic image files to that persona. He felt this was just part of what people normally did in this type of chat room, so he did it. Petitioner did not, however, communicate with Williams or send graphic image files to him in order to importune Williams (as Aimee) to have sexual contact with him [1099-1100]. Moreover, he had no intention of meeting whoever was Aimee in reality [1101].

The graphic image files transferred by petitioner to Williams were sent to petitioner by other Internet users. He did not create any of the graphic images himself and did not obtain them from photographs, videotapes or motion pictures. Further, petitioner had never photographed or videotaped anyone engaged in sex [1097-1101].

Immediately after his chat discussion with Trooper Williams ended, petitioner was contacted for a private chat by someone using the screen name "Redstone." This user had been in the "Daddy/Daughter" chat room with Aimee when petitioner had visited it just before his chat discussion with Aimee. Petitioner

asked Redstone if he was Aimee's father. Redstone responded "yes" and petitioner simultaneously received a graphic file sent by Redstone, who indicated the girl depicted therein in sexual contact with a male (Trial Exhibit 37) was his daughter [1101-04]. Petitioner never heard from Redstone again and had no idea who Redstone was in reality [1104-05].

After the October 28th communication, petitioner made no attempt to contact Aimee [1105-06]. However, on November 12th, Trooper Williams, as Aimee, saw that petitioner was logged onto the Internet and "messaged him directly" for a private chat [567, 570, 787, 1107]. This computer communication between Aimee and petitioner began on the evening of November 12, 1998 and lasted into the early morning hours of November 13, 1998. As Williams acknowledged, petitioner could not even remember who Aimee was during the initial phase of the conversation [788, 1107-08]. Williams' persona, Aimee, proceeded to engage in a sexually graphic discussion with petitioner during which "she" told petitioner that she would someday like to have sex with someone besides her father and that she preferred older men. Part of the conversation involved fantasy discussion regarding how Aimee and petitioner might have sexual relations if they ever met. During this fantasizing, Williams engaged in role-playing and displayed a graphic imagination [573-602]. Not content to let petitioner simply say what he felt like saying, Williams became an equal participant in the discussion, explicitly detailing the sordid sex life and fantasies of his persona. As Williams put it, he felt he had to be "entertaining" [764].

Just as he did during the first chat session on October 28th, Williams introduced Aimee's fictional aunt and cousins from Buffalo into the conversation [575, 592-93]. Significantly, even though Williams had brought up the subject of Aimee's fictional aunt and uncle from Buffalo, petitioner tried to end the conversation so he could go to bed -- without ever mentioning, either as fantasy or otherwise, the possibility of meeting Aimee [575, 592, 1109].

Aimee and petitioner also discussed the graphic image file purportedly representing Aimee which Redstone had sent to petitioner on October 28, 1996. Petitioner then sent this file to Aimee for the purpose of ascertaining whether she was the girl represented in the image, as claimed by Redstone. Aimee denied she was the female depicted [577, 590-91, 608, 783-85, 1107-09]. During this conversation, which lasted for a couple of hours, petitioner transferred no other graphic image files to Williams and made no plans to meet Aimee at any time [510].

The next chat session between Trooper Williams and petitioner occurred on November 15, 1996 from 8:28 p.m. to 10:43 p.m. [615]. Although disputed by Williams, petitioner recalled that Williams contacted him for a private chat [1119].

During the November 15th communication, JustMee and Aimee shared their fantasies about what turned them on [617]. Shortly into the conversation, Aimee announced that "she" was going to find a map and locate where JustMee lived [620-21]. Petitioner also fantasized about what he would like to do with Aimee if they ever met. He did not ask Aimee to meet him and did not make any specific plans to meet at any time [626-27]. No graphic image files were transferred during this chat session.

A fourth chat session took place on November 20, 1996. The conversation between Aimee and JustMee lasted approximately two hours [653; People's Exhibit 44]. After discussing activities over the previous weekend, Aimee asked JustMee why he had not sent more graphic files. Petitioner then sent three graphic image files entitled "pt+teen1.jpg," "pt+teen2.jpg" and "pt+teen3.jpg." He did not, however, know the contents of these files when he transmitted them to Aimee [670-72, 1119, 1169-70; People's Exhibits 47, 48 and 49].

During the November 20th conversation, Trooper Williams adopted the graphic image file sent to petitioner by "Redstone" on October 28, 1996 as representing "Aimee" [657-58; People's

Exhibit 37]. In addition to general sexual talk, petitioner commented that if they ever met, he would like to see Aimee in stirrup pants or leggings [664]. Just a few moments later, Williams mentioned that she was going to talk to her cousin from Buffalo [664].

Eventually, the discussion turned back to the subject of meeting. To petitioner, it was clearly a fantasy; no more than a hypothetical about what they would do together if they ever met. Williams, however, made his character, Aimee, very aggressive, asking JustMee if he would really like to meet and inquiring if JustMee wanted her to see if she could visit her cousin in Buffalo during the holidays [665-66]. While petitioner responded "yes" to the Aimee persona, he quickly made it very clear that he might not show up [667].

During this last Internet chat session on the evening of November 22, 1996, Aimee and JustMee discussed sex and petitioner fantasized about what they could do together if they ever met [693-94]. About an hour later, as JustMee was asking why "Redstone" would send him a picture of Aimee, the troopers executed a search warrant at petitioner's home [696-97]. Petitioner was placed under arrest and taken to the State Police barracks in Lewiston, New York, for questioning.

Before he signed a written statement prepared by State Police Investigator Robin Cadwell, petitioner told the investigator that it was not "real porno" [1129]. Petitioner thought that what he saw on the Internet were not photographs, and that they did not depict real children or real people. Having never seen photographs of children in sexually-explicit situations, petitioner thought that the computer images were composites [1129-30].

As Trooper Williams testified, role playing in Internet chat rooms is prevalent [760]. Approximately 70-80 percent of chat room users are male and it is common for males to play female roles. In fact, Trooper Williams acknowledged that he had seen

role-playing at least a thousand times in Internet chat rooms [760]. Moreover, as Williams noted, a male will get more chat room responses if he pretends to be a female [776]. Not surprisingly, petitioner thought Aimee was the female persona of a male chat room user [1095-97]. He never believed that Aimee was an actual fifteen-and-one-half year old female having sex with her father [1095, 1110]. Petitioner engaged in these chat discussions for fantasy purposes and never intended to meet Aimee [1099-1101, 1108-09, 1118-21, 1179-84].

The jury returned a verdict convicting petitioner of two counts of Promoting a Sexual Performance by a Child (Penal Law §263.15) and two counts of Attempted Disseminating Indecent Material to Minors in the First Degree (Penal Law §110/235.22). On January 20, 1998, the Honorable Michael J. Dwyer sentenced petitioner to two to six years incarceration on each conviction of Promoting a Sexual Performance by a Child and imposed one to three years incarceration on each conviction of Attempted Disseminating Indecent Materials to Minors. The sentences were designated to run concurrently (Appendix at page 35).

On appeal to the New York State Supreme Court, Appellate Division, Fourth Judicial Department, petitioner raised eleven claims, five of which are relevant to this Petition: (1) Penal Law §235.22 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Constitution of the State of New York; (2) Penal Law §235.22 violates the Commerce Clause; (3) Penal Law §235.22 is a content-based restriction on speech which cannot survive strict scrutiny; (4) Penal Law §235.22 is unconstitutionally vague; and (5) Penal Law §263.15 is unconstitutionally overbroad.

On June 18, 1999, the Appellate Division issued a Decision and Order affirming petitioner's conviction (Appendix at pages 22-34). The Court rejected all contentions that the Penal

Law statutes involved were invalid on State and Federal constitutional grounds.

Leave to appeal to the New York State Court of Appeals was subsequently granted by order of the Honorable George Bundy Smith dated August 30, 1999 (Appendix at page 21). The briefs of the parties (including intervenor) are set forth in the Appendix at pages 39-313.

After hearing oral argument, the New York State Court of Appeals issued an Opinion and Order affirming the decision of the Appellate Division, Fourth Department (Appendix at pages 1-20). As relevant to this Petition, the Court of Appeals rejected petitioner's claim that Penal Law §235.22 is overbroad in violation of the First and Fourteenth Amendments to the United States Constitution, finding the scope of the statute's application to be sufficiently circumscribed by the requirement that the defendant intentionally importune, invite or induce a minor to engage in the prohibited sexual conduct. In light of its limitation of the application of Penal Law §235.22 to those instances where the accused intentionally lures a minor into sexual conduct for the accused's benefit, the Court also rejected petitioner's claim of a Commerce Clause violation.

The Court of Appeals further found unpersuasive petitioner's contention that terms used in the "luring prong" of Penal Law §235.22 ("importunes, invites or induces" and "sexual conduct for his benefit") are unconstitutionally vague. The Court also concluded that the statute proscribes "speech-conduct" not protected by the First Amendment and that, in any event, Penal Law §235.22 serves a compelling state interest (preventing the sexual abuse of children) and is no broader than necessary to achieve that purpose.

Finally, the New York State Court of Appeals determined that Penal Law §263.15 is not unconstitutionally overbroad. The Court declined to accept that petitioner's contention that advances

in computer technology permitting the development of graphic images not involving the use of actual children -- protection of whom was the justifying rationale in New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982) -- necessitated that the jury be instructed that the People must prove the use of actual children in the prohibited performances at issue.

POINT I

PENAL LAW §235.22 IS A CONTENT-BASED RESTRICTION ON SPEECH WHICH CANNOT SURVIVE STRICT SCRUTINY UNDER THE FIRST AMENDMENT

Penal Law §235.22 proscribes certain sexually-oriented communications with minors and imposes criminal sanctions upon speakers who violate its provisions. Petitioner submits that the statute is a content-based restriction on expression which cannot survive strict scrutiny because the limitations imposed on protected speech are far too broad for the limited purpose of the legislation. Accordingly, the New York State Court of Appeals' decision finding the "speech-conduct" prohibited by Penal Law §235.22 undeserving of First Amendment protection and concluding that, in any event, the statute is a precisely drawn means of serving a compelling government interest, should be reversed.

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542 (1992) (citations omitted); see also, Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516 (1995) ["It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys"]. Thus, the first step in any analysis concerning the propriety of government regulation of protected speech is to determine whether the restriction involved is based on the content of the regulated speech. In other words, when

a government regulation burdens protected speech, an analysis must be conducted to determine whether it does so because of disagreement with the content of the regulated speech or merely incidentally while serving purposes unrelated to the content of expression. Boos v. Barry, 485 U.S. 312, 320-21, 108 S.Ct. 1157, 1163 (1988). Content-based speech restrictions are presumptively invalid and will not survive the applicable strict scrutiny analysis unless the government meets its heavy burden of establishing (1) that the regulation promotes a compelling state interest, and (2) that the government chose the least restrictive means to further the articulated interest. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989); see also, Simon & Schuster v. New York Crime Victim's Board, 502 U.S. 105, 112 S.Ct. 501 (1991).

In the instant case, Penal Law §235.22 prohibits certain communications between speakers based on the content of the message conveyed and the status of one or more of the participants as a minor:

> A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
>
> 2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual

> intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

The statute unmistakably restricts computer communications with minors on the basis of the content of the communication (whether it depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, in a manner which is harmful to minors). See, Reno v. American Civil Liberties Union, 521 U.S. 844, 867, 117 S.Ct. 2329, 2342 (since the purpose of the Communications Decency Act is to protect children from the primary effects of speech, the Act is a content-based restriction on speech). Consequently, as the New York State Court of Appeals recognized, Penal Law §235.22 is a content-based restriction on speech which is subject to strict scrutiny analysis (Appendix at page 15). Petitioner maintains, however, that the Court of Appeals erred in concluding that the speech sought to be prohibited by the statute is not entitled to First Amendment protection because it was, essentially, luring "conduct."

Penal Law §235.22 does not require proof that the accused engaged in any overt act intended to consummate a luring design. Rather, criminal liability can be predicated merely on the jury's interpretation of the speech used in the communication at issue. As another New York court observed in setting aside a conviction under Penal Law §235.22:

> As reprehensible as defendant's crime is, his actual "conduct," as prohibited by the statute, amounts only to speech in its purest form. The action which the statute seeks to prevent is required to be taken, not by the "speaker," but by the recipient of the message.

People v. Barrows, 177 Misc.2d 712, 732, 677 N.Y.S.2d 672, 685 (Kings Co. 1998).[2]

Because the activity proscribed -- importuning, inviting or inducing -- consists of pure speech without the necessity of proving that the accused took any overt steps to move the discussion from fantasy to reality (i.e., entering New York State to meet with a minor; making plane reservations; actually arranging transportation for the minor), an unwitting communication with a minor or with someone whom the speaker erroneously believes is an adult role-playing as a minor exposes the speaker to criminal liability if a law enforcement agent or trier-of-fact interprets the fantasy discussion as an invitation to engage in proscribed sexual activity. To characterize such speech as unprotected conduct carries the distinction to the point of absurdity; one might as well say the speaker's words become conduct by virtue of the physical process of moving his jaw. Unlike the conduct of burning the draft card in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968), the Internet communications at issue constitute speech. Thus, it cannot be said that Penal Law §235.22 prohibits only endangering conduct not protected by the First Amendment.

Turning to the required strict scrutiny analysis, petitioner does not dispute the legitimacy of the government's concern for the welfare of minors. However, petitioner does challenge the constitutional validity of the means chosen to achieve the Legislature's end.

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[2] The decision of the King's County Supreme Court was reversed and the jury verdict reinstated in light of the New York State Court of Appeals' decision in the case *sub judice* by order of the Appellate Division, Second Judicial Department, dated June 5, 2000 (2000 N.Y. App. Div. Lexis 6304).

In order to ensure that Penal Law §235.22 is applied only to that narrow class of cases where the accused is actually engaged in the use of computer communications to lure a minor into prohibited sexual activity, the least restrictive means of accomplishing that goal would be to require proof of an overt act beyond mere speech which evinces the accused's luring design. In the absence of such a proof element, the government remains free to prosecute -- and chill -- Internet expression merely on the basis of its interpretation of the content and meaning of the message conveyed -- a process fraught with all of the dangers attendant to official exercise of essentially standardless discretion. See, Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972).

Significantly, other laws are presently on the books which would allow the prosecution of pedophilic activity without the burdens on protected expression imposed by Penal Law §235.22. Rather than criminalizing speech, unlawful sexual activity -- or actual attempts thereat -- can be prosecuted under the same terms applicable to such activity which occurs without the involvement of computer communication. Just as an individual who, either in person or through the use of a telephone, importunes a minor to engage in prohibited sexual activity and then takes steps to follow through on the inducement to culmination of the activity may face prosecution for various crimes ranging from endangerment to actual or attempted rape, sodomy or sexual abuse (depending on the degree of overt action taken), so too may a perpetrator who uses the Internet to communicate with a minor and then takes action to consummate illicit sexual relations be prosecuted.

Penal Law §235.22 is a content-based regulation of speech which does not employ the least restrictive means to accomplish its goals. Accordingly, appellant respectfully requests that this Court reverse the order of the New York State Court of Appeals and dismiss the counts of the indictment charging Attempted Disseminating of Indecent Materials to Minors in the First Degree on the ground that Penal Law §235.22 violates the First Amendment.

POINT II

PENAL LAW §235.22 IS UNCONSTITUTIONALLY VAGUE AND MUST BE DECLARED VOID

The vagueness of Penal Law §235.22 arises from paragraph (2), the "luring" prong. Ostensibly intended to prohibit Internet or other computer contact with a minor for the purpose of encouraging such minor to engage in the delineated sexual activity, the statute impermissibly defines the luring conduct in terms of an unduly broad and ambiguous nature.

For instance, a speaker is guilty of first degree dissemination of indecent material to a minor when he uses a computer to violate paragraph (1) of Penal Law §235.22 and, in the same computer communication with a minor, "he importunes, invites or induces a minor to engage in sexual intercourse . . . ." Penal Law §235.22(2). The phrase "importunes, invites or induces" not only fails to provide adequate notice of what is prohibited, it also permits arbitrary and discriminatory application of the law by both law enforcement authorities and jurors called upon to interpret the speech at issue.

The New York State Court of Appeals rejected petitioner's vagueness challenge, stating that, "[w]hile 'importune,' 'invite' and 'induce' are not defined terms, a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful, sexual images" (Appendix at page 3).[3]

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[3] Ironically, while the Court of Appeals felt this was obvious, the Oneida County District Attorney's Office maintained that Penal Law §235.22 did not have a specific intent element (Appendix at page 145).

The Court also concluded that the statute admits of no possibility of arbitrary or discriminatory enforcement because it "employs objective, ascertainable standards which do not provide room for law enforcement officers to apply the statute based upon their own personal ideas of right and wrong" (Appendix at page 14). In light of the inherent vagueness of the terms at issue, petitioner submits that the Court of Appeals' First Amendment analysis did not pay sufficient deference to the need for precision in the drafting of statutes which restrict speech.

One of the fundamental precepts of constitutional law is that "[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). Restrictions on these individual freedoms imposed by statute must have both a lawful foundation and definiteness and certainty of expression. Id.

Accordingly, a law is unconstitutional if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926); Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686 (1971). This rule stems from the theory that an average person must be given a "reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99 (1972). Moreover, when First Amendment freedoms are involved, a greater degree of precision is required. Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247 (1974). "The twin dangers of a vague law -- lack of notice and arbitrary or discriminatory application -- may chill the exercise of important constitutional rights . . . Not surprisingly, therefore, courts apply a heightened vagueness standard to a law that could deter protected speech because of its uncertain meaning." Finley v. National Endowment for the Arts, 100 F.3d 671, 675 (9th Cir. 1996).

Of paramount importance is the prevention of arbitrary and discriminatory enforcement. If arbitrary and discriminatory

enforcement is to be prevented, laws must provide explicit standards for those who apply them, Grayned v. City of Rockford, supra at 110, 92 S.Ct. at 2299, in order to avoid the pursuit of "personal predilections" by police, prosecutors and juries. Kolender v. Lawson, supra at 357-58, 103 S.Ct. at 1858.

Among the myriad of Internet uses and activities available, computer "conversations" in chat rooms are very popular. Indeed, as noted in the 1997 American Libraries Association decision, thousands of different chat rooms exist and are frequented by tens of thousands of users. American Libraries Association v. Pataki, 969 F.Supp. 160, 166 (S.D.N.Y. 1997). Further, as the trial testimony established, those Internet chat rooms allow computer users to assume any persona they desire [996]. Consequently, role playing is prevalent and, as both Trooper Williams and Internet expert Dr. David Murphy explained, role playing in sex-related chat rooms is a common form of Internet entertainment [524, 539-43, 548-50, 760].

Not surprisingly, therefore, an untold number of these sex-related chat room conversations involve fantasies. The danger of applying of Penal Law §235.22 as it presently exists to such communications is obvious. Because the statute does not require that one charged with its violation be shown to have taken overt steps to effectuate the alleged luring plan, there exists the very real risk that individuals involved in sexually-related fantasy discussions in these chat rooms or through other modes of computer-assisted communication may find themselves facing prosecution for expressing sexual thoughts or desires which they have no actual intention of ever fulfilling, but which are misinterpreted -- either intentionally or unintentionally -- by law enforcement officials.

Because the expression proscribed -- importuning, inviting or inducing -- consists of pure speech without the requirement of proving that the defendant acted to move the discussion from fantasy to reality, the determination of the meaning of the statements made during the course of the subject computer communication necessarily centers on the interpretation given those words by police

and prosecutors. For example, an Internet speaker who unknowingly engages in fantasy talk with an on-line persona who turns out to be a State Police investigator may find that the only thing standing between him and the filing of criminal charges is the officer's personal opinion as to whether he actually intended to follow through on the fantasy discussed.

The language of the Internet is not simply that of commercial business, contracts or law. Communications among the many millions of people world-wide using the Internet concern a variety of subjects "as diverse as human thought." Reno v. American Civil Liberties Union, supra at 852, 117 S.Ct. at 2335. Inevitably, many of those subjects relate to human sexuality and eroticism. The strictures of Penal Law §235.22 chill sexually-related expression by failing to give speakers sufficient objective notice of what is prohibited and by permitting criminalization of pure speech through the varying and standardless interpretive efforts of law enforcement officials and triers of fact.

New York has hung the threat of prosecution over the heads of those whose erotic discussions on the Internet flow through the State. It cannot be gainsaid that the communication of ideas -- whether sexual or not -- often involves apparent statements of fact, even if they are only fantasy. Given the pervasiveness of the Internet today and, in particular, the popularity of sex-related chat rooms, the threat that Penal Law §235.22 will be applied to lawful speech is ever-present and, consequently, so is its chilling effect. Arguably, construing the statute to require as an element proof of an overt act tending to effectuate an invitation extended to a minor to engage in proscribed sexual activity for his benefit would narrow the sweep of the statute to prohibited conduct rather than mere speech, but such a construction has not been rendered by New York State's appellate courts. In the absence of such a limiting construction, New York will continue to "burn the house to roast the pig." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 127, 109 S.Ct. 2829 (1989).

A. The "Sexual Conduct For His Benefit" Element of Penal Law §235.22(2) is Also Unconstitutionally Vague.

Penal Law §235.22(2) prohibits a speaker from using described computer communications to "lure" a minor into engaging in "sexual conduct for his benefit." While "sexual conduct" is defined by Penal Law §235.20(3) as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if the person be a female, breast," the addition of the phrase "for his benefit" in the context of the computer communications intended to be regulated renders the term as a whole vague.

In the instant case, the People argued to the jury that petitioner was guilty of disseminating indecent material to minors in the first degree because he encouraged the fictional "Aimee" to masturbate during an on-line typed chat discussion [1260-61]. Of course, no masturbation occurred because "Aimee" was a character whose role in this Internet fantasy discussion was played by Trooper Mark Williams. The New York State Court of Appeals ruled that the phrase "sexual conduct for his benefit was not vague in that the term "benefit" was defined by Penal Law §10.00(17) as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary" (Appendix at page 14).

Petitioner submits that the statutory definition of "benefit" does not render the phrase "sexual conduct for his benefit" sufficiently precise to pass constitutional muster. In the absence of an overt act beyond the "mere words" used in the communication, the law enforcement agent or juror is left to evaluate pure speech without the ability to apply specific and objective standards in order to distinguish between a *bona fide* attempt to lure a minor into masturbation for the speaker's benefit (for example, at a physical meeting where the minor exposes his or her genitals to the speaker and masturbates for his pleasure) and simple fantasy talk where the

speaker has no real intention of ever taking steps to meet the minor, which obviously is the ultimate goal of "luring."

Furthermore, although "sexual conduct" is defined by statute, Penal Law §235.22(2) gives no notice that its provisions would criminalize an invitation to a minor to masturbate outside of the presence of the speaker during a cyberchat consisting of non-verbal, typed communication. Indeed, review of the proscribed sexual activities delineated in paragraph 2 suggests that Penal Law §235.22 was intended to prohibit only computer communications intended to seduce a minor into the physical presence of the speaker for consummation of a sexual act or to engage in a sexual performance (play, motion picture, photograph or dance; Penal Law §263.15) for the speaker. The standardless discretion afforded police, prosecutors and juries by this statute, however, allows for the pursuit of "personal predilections" -- in this case the inclination to punish appellant's speech insofar as it could be interpreted as an encouragement of on-line masturbation by the fictional character "Aimee."

Accordingly, petitioner respectfully requests that this Court find Penal Law §235.22 impermissibly vague in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution, mandating reversal of the order of the New York State Court of Appeals and dismissal of the relevant counts of the indictment.

POINT III

PENAL LAW §235.22 IS UNCONSTITUTIONALLY OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Before the New York State appellate courts, the Oneida County District Attorney's Office took the position that Penal Law

§235.22 did not require the People to prove that an accused had a specific intent to communicate with a minor (Appendix at page 145). Petitioner contended that the statute was unconstitutionally overbroad in the absence of a requirement that the People prove not only that the criminal defendant knowingly and intentionally communicated with a minor, but also that he took some overt step to effectuate the alleged luring plan. The New York State Court of Appeals rejected petitioner's overbreadth challenge, explaining that "the statute should be read as requiring that an individual intend to initiate this kind of communication with a minor and thereby further intend to 'importune, invite or induce' the minor to engage in sexual conduct for the sender's benefit" (Appendix at page 11).

Petitioner submits that even construing Penal Law §235.22 to include a specific intent element does not bring the scope of its applications within constitutional limits. Laws which are overbroad and threaten the exercise of First Amendment rights are unconstitutional. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973). Where legislation is not narrowly drawn, "[t]he crucial question then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. Rockford, 408 U.S. 104, 114-15, 92 S.Ct. 2294 (1972). Even with the narrowing construction adopted by the New York State Court of Appeals, Penal Law §235.22 burdens a substantial amount of constitutionally protected expression.

Requiring that the prosecution establish that the accused intended to communicate with a minor does not change the fact that, as discussed above, the omission of an overt act element leaves the communication at issue to be judged merely on the meaning given to it by the individual charged with interpreting the message. Consequently, sexually-related statements or fantasy talk not anticipated by the speaker to be taken as true or intended may still be construed as an intent to communicate unlawfully with a minor despite the absence of any evidence indicating that the speaker took any step to effectuate the supposed luring intent.

Moreover, where the communication is left to be judged on the interpretation of its message alone without requiring that it be shown that the speaker took some step to bring the alleged luring plan to fruition, the problem noted by this Court in Reno v. American Civil Liberties Union, supra, still exists: "there is no reliable way for commercial or non-commercial speakers to ascertain the age of an Internet user. Id. at 882, 117 S.Ct. at 2349-50. Thus, sexually-oriented expression via the Internet can still be chilled by the "hecklers veto."

Finally, Penal Law §235.22 is also overbroad by virtue of the fact that the standard as to what is "harmful to minors" under the standards presently prevailing in New York State will burden Internet communication outside New York's borders. In light of the geographically borderless nature of the Internet's reach, New York's standard for what is obscene as to children practically requires all Internet communication to conform to that standard in order to avoid possible prosecution, thus "reducing the adult population . . . to . . . only what is fit for children." Sable Communications of Cal., Inc. v. FCC, supra at 128, 109 S.Ct. at 2837 (citations omitted). The overbreadth of such a provision is, therefore, readily apparent.

The sweep of Penal Law §235.22 reaches far more protected speech than is constitutionally permissible. Accordingly, petitioner respectfully submits that the statute violates the First and Fourteenth Amendments to the United States Constitution, requiring reversal of the decision of the New York State Court of Appeals and dismissal of the corresponding counts of the indictment.

POINT IV

PENAL LAW §235.22 VIOLATES THE COMMERCE CLAUSE

The New York State Court of Appeals determined that Penal Law §235.22 "does not discriminate against or burden interstate trade; it regulates the conduct of individuals who intend to

use the Internet to endanger the welfare of children" (Appendix at page 17). Petitioner submits that the fact that the statute is intended to prevent the unlawful luring of minors into sexual activity does not diminish the effect of the statute on interstate commerce.

Whether a state statute transgresses upon the regulatory power of Congress is determined by reference to a long established rule: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844 (1970). In American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997), the District Court ruled that Penal Law §235.21(3), which criminalizes the communications set forth in Penal Law §235.22(1) as Disseminating Indecent Material to Minors in the Second Degree, is "closely concerned with interstate commerce, and scrutiny of the act under the Commerce Clause is entirely appropriate." Id. at 173. Characterizing the Internet as a "borderless world" which transcends states' geographical limits, the District Court concluded that Penal Law §235.21(3) contravened the Commerce Clause by (1) projecting New York law outside the State; (2) burdening interstate commerce to an extent which clearly exceeded any local benefit (protection of children from indecent material) derived from the statute; and (3) by regulating an area of commerce (the Internet) which "must be marked off as a national preserve to protect users from inconsistent legislation that . . . could paralyze develop of the Internet altogether." Id. at 169.

The inclusion of a luring prong in Penal Law §235.22 does not insulate the statute from the deficiencies noted by the American Libraries court. Given that there is no overt act element which would limit application of the statute to New York conduct, Penal Law §235.22 burdens Internet communication beyond New York's

border and, therefore, violates the Commerce Clause, requiring reversal of the decision of the New York Court of Appeals.

POINT V

PENAL LAW §263.15 IS UNCONSTITUTIONALLY OVERBROAD

As the New York State Legislature recognized with the enactment of Penal Law §235.22 in 1996 and Congress acknowledged with the passage of the Child Pornography Protection Act ("CPPA") that same year, technological advances during the almost twenty-three years since the enactment of Penal Law §263.15 (Promoting a Sexual Performance by a Child) has led to sweeping changes in both the methods of popular communication and in creative imaging technologies. These changes permit the creation of fictional images of people, animals, objects, etc., which appear to be actually real, as was recognized by both the defense and prosecution witnesses at trial.

In the instant case, the trial court did not make any express ruling or instruction that proof of the use of actual children in the prohibited performances is a required statutory element. Petitioner submits that if Penal Law §263.15 is not construed as requiring the portrayal of an actual child engaged in sexual conduct -- as opposed to a fictional representation -- the sweep of this regulation of speech extends far beyond the child protective objectives of the Legislature when it originally enacted the statute. Constitutionally protected expression of sexually explicit -- but non-obscene -- ideas and images could therefore be suppressed by application of the statute to materials which do not contain depictions of actual children engaged in sexual conduct and which consequently do not cause the adverse effects to real children sought to be prevented by Penal Law §263.15. The New York State Court of Appeals decision ignores the fact that constitutional jurisprudence is not static; as expressive media emerge, develop and change, the impact of speech restrictions must be judged anew in light of the

potential for overly broad applications of even partly anachronistic regulations. The Court of Appeals' conclusion that "the jury was thus instructed to consider, from the evidence before it, whether or not a child who participated in the performance was under the age of 16" fails to acknowledge that proof of the use of an actual child is necessary, not just a determination of the age of the child represented in the image (Appendix at page 19). Petitioner submits that, in the absence of such a construction, Penal Law §263.15 is fatally overbroad.

It cannot be gainsaid that Penal Law §263.15 was enacted to combat the risk of physical and psychological harm caused to real children who are used in the production of child pornography. New York v. Ferber, 458 U.S. 747, 758, 102 S.Ct. 3348, 3355 (1982) ["[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child"]. The compelling state interest in eliminating such child abuse and the narrow scope of its application "to works that *visually* depict sexual conduct by children below a specified age," permitted this content-based restriction on speech to survive strict scrutiny. New York v. Ferber, supra at 763-64, 102 S.Ct. at 3358 (emphasis in original).

Today's technology, however, permits the creation of visual depictions of people who appear to exist in reality, but who are actually fictional creations [1016-17]. In fact, the Internet expert who testified for the defense at the instant trial explained that sometimes graphic images are created or altered so well that it would be difficult for even an expert to determine whether the image represents an actual object or person in reality or is simply a fictional representation [1014-18]. The People's main witness, New York State Trooper Mark Williams, corroborated the expert's testimony concerning the capabilities of present-day graphics design technology [737-41].

Consequently, petitioner submits that, in the absence of proof that the individuals depicted in the graphic images offered at trial are or were real children engaged in actual sexual performances, petitioner cannot be properly convicted of violating New York State Penal Law §263.15. Unless conviction under this statute is premised on a finding beyond a reasonable doubt that the child depicted in the suspect image is or was real, the legitimate government interest justifying suppression of such expression does not exist.

As the Ninth Circuit Court of Appeals has observed, "non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment." Free Speech Coalition v. Reno, 198 F.3d 1083, 1096 (9th Cir. 1999). In that case, the Free Speech Coalition argued that those provisions of the Child Pornography Prevention Act of 1996 ("CPPA") which prohibited visual depictions which even appeared to be of a minor engaging in sexually explicit conduct are impermissible content-based restrictions on protected speech and are unconstitutionally overbroad. 18 U.S.C. §2256(8)(B).

In finding that the CPPA provision criminalizing the creation of images which even appear to be child pornography to be overbroad, the Ninth Circuit discussed the Senate's failure to accord proper significance to the changes and technology since Ferber was decided in 1982 and pointed out that:

> The government's interest in prohibiting computer-generated child pornographic depictions is not the same as its interest in prohibiting child pornography produced by using actual children. In the latter instance there may be direct and indirect harm to a child. In the former instance there is no harm, and there can be none, to an actual child, if no real human is used in the production of the images.

Free Speech Coalition v. Reno, supra at 1096.

While the CPPA and Penal Law §263.15 contain differing elements, the absence of a requirement under New York law that the jury find not only that the image at issue depicts what appears to be a child under sixteen years of age, but also that it depicts an actual child, has the same functional effect of the "appear to be" language of the CPPA: under both statutes the accused may be convicted even though the image does not represent a child who exists or existed in reality.

In the instant case, petitioner's jury was not instructed to determine whether the graphic images at issue in his trial depicted actual children, an instruction necessary to narrow the application of Penal Law §263.15 to a constitutionally permissible scope. Accordingly, the violation of petitioner's rights under the First and Fourteenth Amendments to the United States Constitution warrant the granting of certiorari, and reversal of his conviction.

CONCLUSION

Petitioner respectfully submits that this Court should grant his petition for a writ of certiorari for the purpose of ruling that Penal Law §235.22 and Penal Law §263.15 violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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